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SWIDLER BERLIN SHEREFF FRIEDMAN, LLP

3000 K STREET, NW, SUITE 300
WASHINGTON, DC 20007-5116
TELEPHONE (202)424-7500
FACSIMILE (202) 424-7645

NEW YORK OFFICE
405 LEXINGTON AVENUE
NEW YORK, NY 10174

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VIA COURIER

Magalie Roman Salas
Secretary
Federal Communications Commission
The Portals
445 12th Street, S.W.
Washington, D.C. 20554

Re: Joint Petition of BellSouth, SBC and Verizon for Elimination of Mandatory Unbundling of High Capacity Loops and Dedicated Transport (CC Docket No. 96-98)

Dear Ms. Salas:

On behalf of El Paso Networks, LLC ("EPN"), this *ex parte* letter responds to the Reply Comments of BellSouth, SBC and Verizon ("the RBOCs") submitted on June 25, 2001.

EPN submitted Initial and Reply Comments in this proceeding wherein EPN explained that the RBOCs' had failed to provide any credible factual or legal basis for removing "high capacity" loops and dedicated transport facilities (including dark fiber) from the list of nationally available unbundled network elements ("UNEs"). EPN further documented the extent to which its own business operations would be impaired and adversely affected if the RBOC Petition was granted. Finally, EPN argued that the Joint Petition was plagued by numerous procedural infirmities which required its immediate rejection.

Approximately three dozen other carriers also submitted comments, each documenting the extent of its reliance on the RBOCs' last mile loop and transport facilities, and the lack of third-party alternatives to the RBOCs' facilities. These comments represent a broad cross-section of the competitive telecommunications industry. As such, the collective weight of the evidence goes far beyond mere "anecdotal" evidence of the continuing importance of

maintaining the availability of these crucial last-mile network elements to requesting CLECs. The commenters also demonstrated that the Commission could not rationally rely upon "factual" information submitted by the RBOCs as the basis for making any change in the currently existing rules. Collectively, the comments preclude any serious consideration by the Commission of the RBOCs' Joint Petition.

EPN, therefore, urges the Commission expeditiously to dismiss the Joint Petition, either on procedural grounds or on the merits. Moreover, the Commission's delay has not escaped the attention of those monitoring the competitive telecommunications industry on Wall Street and elsewhere, who recognize the devastating impact that limiting the availability of loops and transport facilities would have on the competitive industry. Fueling these concerns are reports that the RBOCs are advocating a "trade-off" between the Petition and use restrictions on EELs, as well as in a carve-out limiting access to high capacity loops and transport similar to the one adopted for unbundled local switching in the *UNE Remand Order*.[1]

In the *UNE Remand Order*, issued less than two years ago, the Commission found that high capacity loops and transport (including dark fiber and EELs) belonged on the UNE list, and that the list should remain undisturbed for three years. Eighteen months later, the RBOCs have disrupted the quiet period by initiating this proceeding, and have done so without presenting a shred of new evidence or raising a single new argument.[2] The RBOCs, thus, seek to disrupt a host of business plans and billions of dollars of private investment. To some extent, they have already succeeded by filing the Petition.

It should be clear that RBOCs' proposal would be tantamount to a repeal of the local competition provisions of the Telecommunications Act of 1996. The *quid pro quo* for being allowed to enter the InterLATA voice and data markets was that the RBOCs would be required to "unbundle" their ubiquitous last-mile networks, which were built over years of guaranteed rate-of-return regulation. The RBOCs now seek to walk away from that commitment.

The RBOCs simply do not believe that they should be required to unbundle key elements of their network, or make those elements available to requesting CLECs at cost-based rates, as the Act plainly mandates. Second, the RBOCs have failed utterly to respond to the evidentiary

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[1] *See* Edie Herman, *EELs' Dispute Returns to Center Stage at FCC*, Communications Daily, Aug. 31, 2001, at 2-4.

[2] *See* Allegiance/Focal Joint Initial Comments at 13-18 (demonstrating that the *UNE Remand Order* considered but rejected each of the arguments made by the RBOCs in the Joint Petition).

showings made by the CLEC commenters. Rather, the RBOCs essentially ask the Commission to overlook the factual reality of CLEC usage of, and dependence upon, the ILEC's last-mile network elements. The Commission should, therefore, act quickly and deny the Joint Petition, if it does not summarily dismiss it on procedural grounds.

The essential thesis of the RBOC Petition is that alternative competitive facilities are available in the market, or that CLECs can self-provision such facilities. Thus, the RBOCs focus on isolated examples of CLEC usage of alternative facilities as evidence that competitive facilities are available. Those CLECs that continue to rely on ILEC network elements, on the other hand, are accused of taking advantage of a "massive arbitrage – the ability to use ILEC dedicated transport and high-capacity loop UNEs at bargain basement rates, in lieu of their own facilities or competitively provided special access services."[3]

This statement, and others like it scattered throughout the RBOCs' filings, demonstrate that their real complaint in this proceeding is with the obligations imposed by the Act in general, and with TELRIC pricing in particular. The RBOCs have, of course, pursued these grievances in various fora. The Supreme Court will hear oral argument on the merits of TELRIC this fall, and the RBOCs' sponsorship of, and lobbying for, the so-called Tauzin-Dingell "Broadband Relief" Bill (HR 1542) is a matter of public record. The instant regulatory rear-guard action is just one more front in the RBOCs' efforts to immunize next generation networks from the pro-competitive obligations of the Act.

The most outrageous aspect of the RBOC Petition, though, is that the "arbitrage" the RBOCs complain about is actually evidence of the Act working as Congress intended. Nothing in the Act, its legislative history, or this Commission's orders suggest that Congress expected competitors to eventually duplicate the ILECs' in-place, last-mile network. The whole point of TELRIC pricing is that it permits carriers to take advantage of the ILECs' economies of scale.[4] Consider the case of a new subdivision with 1,500 addresses. It will always be more costly for a CLEC to construct lines to serve 150 discrete customers than to pay the ILEC 10 percent of its total costs for constructing facilities that serve the entire subdivision. Thus, the RBOCs are simply off-base when they compare the incremental cost associated with constructing new stand-alone loop facilities with the comparable TELRIC rate.[5] That the TELRIC price is lower is not evidence that it is confiscatory, but rather reflects ILEC efficiencies in which CLECs are permitted to share.

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[3] Joint RBOC Reply at 10.

[4] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, CC Docket No. 96-98, 11 FCC Rcd 15499 (1996) ¶ 679.

[5] *See, e.g.*, RBOC Reply at 12.

The fact that competitive overlay transport networks are being constructed by competitors such as EPN illustrates the logical failings of the RBOCs' argument. Such networks are being constructed where it is cost-efficient to do so, notwithstanding the availability of TELRIC-priced alternatives. Moreover, TELRIC masks a host of other costs that CLECs incur when buying RBOC UNEs, such as the capital costs for switches, collocation cages, and other equipment, as well as recurring costs for ordering and billing. Thus, the TELRIC rates that CLECs pay for RBOC UNEs represent only part of the costs EPN incurs when providing telecommunications service to its customers. Coupled with the transaction costs (*i.e.,* hassle factor) of dealing with suppliers (*i.e.,* the ILECs) that, perversely and contrary to their own economic interests, do not want the CLECs' business, competitive carriers do, indeed, face considerable costs in serving their customers.

The RBOCs' also suggest that they view the Act's unbundling obligations as temporary, complaining, for example, that the "CLECs' standard would assure unlimited, unending unbundling ...."[6] While it is unclear what "unlimited" unbundling means, the RBOCs are correct that the Act contains no explicit sunset provision on the ILECs' unbundling obligations. Thus, the RBOCs' unbundling obligations under section 251(c)(3) will continue unless and until the Commission makes the necessary forbearance findings under the Act – findings which are obviously a long way off at this point. *See* 47 U.S.C. § 10(d).

Although the Commission should not eliminate the availability of high capacity loops and transport to any extent, EPN emphasizes that doing so prematurely would give early-established CLECs a "first mover" advantage over newer entrants such as EPN. There is no basis in the Act or the policies it seeks to promote for such a result. The recent failures of many first-wave CLECs demonstrates that it would be folly for the Commission to precipitously deem competition "established" just because some competitors have entered the market. Indeed, the Act permits new competitors to enter the market at *any* point and offer *any* type of local exchange or exchange access service it wishes. EPN anticipates that CLECs of the future – companies not yet in business – will seek to provide specialized services that take advantage of some, if not all, of the ILECs' network. Because the unbundling obligations imposed upon ILECs by the Act are continuing in nature, the public will benefit from these new services, just as the public benefited from the first wave of DSL carriers that spurred the ILECs to invest in their own similar facilities.

Thus, ILEC networks must remain available, and ILECs must continue to be subject to

[6] RBOC Reply at 16.

the Act's unbundling obligations so that competitive carriers can serve *all* the end-user customers they seek to serve. Only the ILECs' ubiquitous last-mile networks have the scope and reach necessary to provide this access. The need for competitive carriers to be able to serve all prospective customers illustrates why the RBOCs are plainly wrong that evidence of central office collocation, used as a proxy for determining the competitive status of the special access market, can also guide the impairment analysis required by section 251(d)(2)(B).[7] As several carriers explained in the opening and reply rounds of this proceeding, the special access pricing flexibility inquiry focuses on whether competitive choices are available to *customers*.[8] The statutory-based impairment analysis, on the other hand, focuses on whether facilities are available for use by competitive provides. The two inquiries have little, if anything, in common. In other words, even if some competitors deploy their own facilities, others will still be impaired without unbundled access to the ILECs' network.

The bottom line is that CLECs continue to require unbundled access to ILEC network elements, and will for the foreseeable future. As EPN explained in its initial Comments, "ILECs are usually the only source for obtaining loops and transport, including dark fiber," in the areas it serves.[9] The other commenters in this proceeding presented similar evidence. The RBOCs' dismissal of the numerous affidavits as a "handful of anecdotes"[10] rings hollow. These front-line reports are the only "market based evidence" submitted in this proceeding, and are certainly entitled to more weight than Mr. Crandall's statistically meaningless econometric analysis.[11]

Moreover, the RBOCs embrace anecdotal reports when it suits their purposes, as exemplified by the "Fact Report's" numerous citations to stale web-links, and the Reply Comments' repeated invocations of Covad's and Nextel's use of alternative facilities.[12] Covad and Nextel reportedly obtain one-half and one-third of their transport facilities respectively from competitive providers. Thus Covad and Nextel – the carriers the RBOCs cite as the poster-

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[7] *See* RBOC Reply at 45-46.

[8] *See, e.g.,* Allegiance/Focal Comments at 17.

[9] EPN/Global Broadband Joint Comments at 15.

[10] Crandall Rebuttal Declaration at 28.

[11] *See* AT&T White Paper, *An Economic and Engineering Analysis of Dr. Robert Crandall's Theoretical 'Impairment Analysis'"* (filed June 11, 2001 in Docket No. 96-98) at 31-33 (demonstrating that Crandall's "statistical" analysis has a confidence interval of more 50 percent. In other words, Crandall's analysis is more likely to be wrong than correct.).

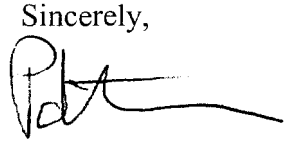
[12] RBOC Reply at 4, 19.

children for CLEC "self-reliance," continue to rely extensively on ILEC facilities to serve their customers. These carriers can not serve all the customers they seek to serve without access to the ILECs' network.

CLECs will continue to rely on ILEC last-mile facilities for some time to come. For this reason, the Commission should not remove ILEC transport facilities or high capacity loops, including EELs, from the list of nationally available UNEs to any extent, including pursuant to any "carve out." The Commission should not limit the availability of a given network element unless there is some evidence that CLECs will not be impaired without access to it. In the case of local switching, for example, given the numerous CLECs that have deployed their own switches, there was sufficient evidence to support the Commission's decision to limit the availability of unbundled switching to three lines in the 50 largest MSAs. There has simply been no comparable evidence documenting the availability of alternatives to the ILECs' loop and transport facilities presented in this proceeding. There is thus no basis for restricting the availability of loop and transport UNEs.

For all of these reasons, and for the many others set forth by the other commenters in this proceeding, the RBOC Joint Petition must be denied.

Sincerely,



Patrick J. Donovan
Michael C. Sloan

Attorneys for El Paso Networks, LLC

cc: Michelle Carey
Brent Olsen
Kathy Farroba